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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

PETITION NOT PRINTED

No. 770

TED STEVEN CHIMEL,

Petitioner,

vs.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITIONER'S BRIEF

PETITION FOR CERTIORARI FILED MAY 16, 1968
CERTIORARI GRANTED NOVEMBER 25, 1968

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PETITIONER'S BRIEF

Opinions Below

The opinion of the Court of Appeal, Fourth Appellate District (vacated by grant of hearing in State Supreme Court), is not officially reported, but is published in 61 Cal. Rptr. 714, *People* v. *Chimel,* August 30, 1967. The opinion of the California Supreme Court is reported in 68 C. 2d ——,* 67 Cal. Rptr. 421, April 10, 1968. The companion opinion of the California Supreme Court, *People* v. *Sesslin,* is reported in 68 C. 2d ——,** 67 Cal. Rptr. 409.

* 68 Adv. Cal. 448.

** 68 Adv. Cal. 431.

Jurisdiction

The judgment of the California Supreme Court was entered on April 10, 1968. The petition for a writ of certiorari was filed with this Court on May 16, 1968. The jurisdiction of this Court is invoked under 28 U. S. Code section 1257(3) on the ground that a right guaranteed to the petitioner by the United States Constitution has been infringed by the judgment of the lower court. The petition for a writ of certiorari was granted by order of this Court made on November 25, 1968.

Constitutional Provision Involved

Amendment Four to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. C. A., Constitution, Amendments 1 to 5, p. 102.

Questions Presented

1. Does the Fourth Amendment state a general principle which requires antecedent justification before a magistrate of every search or seizure of person or property, subject only to judicially-created exceptions of necessity?

2. Is the constitutionally permissible scope of a warrantless arrest-based search equivalent to the permissible scope of a warrant-based search?

Statement of Facts

The Pulati home was burglarized on February 2, 1965. [28]* On that occasion defendant was absent from a meeting of a coin club which he had attended once a month for the preceding four months concurrently with the Pulatis. [33] Prior to that time, defendant had visited the Pulatis in their home to discuss coins generally with them and knew that they kept some coins there. [24] However, defendant had never been in the room from which the burglarized property, two drawers containing coins, was taken. [37-38]

On the night of August 14, 1965, the Money Vault, a coin shop, was burglarized. [96-97] On the afternoon preceding the Money Vault burglary the defendant stated to a neighbor that he was going to "knock over a coin shop." [247-48] On the day following, defendant stated to the same neighbor that he had broken through one wall of the shop but had not entered due to some black wires he encountered there. [250-51] Several weeks later, defendant stated to another coin dealer that he had been involved in the burglary of the Money Vault. [260-61] During this same period of time, the last half of August, defendant took part in a conference at the Orange Police station which was attended by defendant, one Charles Hamburger, attorney Everett Jones (representing Hamburger), and two officers of the Orange Police Department. [360, 376] This conference centered around the possibility of return-

* Bracketed numbers refer to pages of Reporter's Transcript.

ing the stolen coins in consideration of a civil release. [368] The defendant claimed that Slocum, the owner of the Money Vault, published the extent of his loss over the coin circuit teletype and was, at the conference, claiming a greater loss than he had published. [373] Thereafter, some of the stolen coins were seized from Attorney Jones' office. [376] Hamburger was never arrested. [378]

Shortly prior to that conference, and on August 25, the investigating officer, Del Coma, had arrested defendant on the street without a warrant, based on probable cause to believe that defendant was implicated in the burglary of the Money Vault. [356-57, Op. Cal. S. Ct., p. 9, fn. 4]* After some questioning at the police station, defendant was released without being charged.

Officer Del Coma obtained a warrant for the arrest of defendant on September 13 at 10:39 a. m. [325] This warrant was issued solely on the basis of a complaint which had been filed in the Municipal Court, charging one crime only, the burglary of the Money Vault. [269, 558] The complaint is, in relevant part, set out in the footnote.[1]

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* 68 Adv. Cal. at 454; —— Cal. Rptr. at ——.

[1] The complaint, as set forth in the opinion of the Court of Appeal, recited:

"Personally appeared before me this 13th day of September, 1965 T. DEL COMA who, after being first duly sworn, deposes and says:

"That on or about the 14th day of August, 1965, at and within Orange County, California, the crime of Felony, to-wit: Violation of Section 459 of the Penal Code was committed by Ted Steven Chimel who at the time and place last aforesaid, did then and there willfully, feloniously and burglariously enter a building known as The Money Vault, located at 153 North Glassell Street, Orange, in said County and State, with intent to commit theft.

(*footnote continued on next page*)

The officer, at the time of receiving the warrant, knew where defendant lived, knew where he worked, knew his telephone number and knew his hours of employment. [326, 370-71] Instead of executing the warrant upon its receipt according to its command, "forthwith to arrest the . . . defendant," the officer waited until after 4:00 p. m., at which time he went, in company with two other officers, to defendant's home, knowing that defendant was not there at that time. Having gained admission, the officers waited for defendant to come home from his employment. After a short time, defendant entered the residence carrying his lunch bucket, whereupon Officer Del Coma placed him under arrest on the authority of the warrant. [270-71]

Over defendant's protest, and purporting to act on the authority of the arrest warrant, the officer commenced a search of defendant's home. The search covered each bedroom, the sewing room, the living room, the kitchen, the attic, the bathroom and the garage. [274, 317-20] Drawers, boxes, cabinets, closets, suitcases and all portions of the premises not open to view were searched. [273, 329-30] This was a general search and was for nothing specific. [316, 323, 330] No evidence was offered to show that the

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"All of which is contrary to the form, force and effect of the Statute in such cases made and provided and against the peace and dignity of the people of the State of California.

"Wherefore, said complainant prays that a warrant may be issued for the arrest of said Ted Steven Chimel and that he be dealt with according to law."

The warrant which was issued on the basis of this complaint was conceded by the respondent and held by the Court of Appeal and the California Supreme Court to be constitutionally defective on the authority of *Giordenello* v. *United States,* 357 U. S. 480 (1958); *Aguilar* v. *Texas,* 378 U. S. 108 (1964) and *Barnes* v. *Texas,* 380 U. S. 253 (1965). That portion of the lower courts' holding is not in issue here.

officers had knowledge that any particular property was likely to be found in defendant's residence. At the time of this search, the premises were in the joint possession of defendant, his wife, and their small child. [270]

No evidence was offered to show that anything other than coins had been reported missing from the Money Vault. [105-09, 124-25] Nevertheless, during this search Del Coma seized a sizable collection of other items such as boxes, medals, razor blades, tokens, and coin wallets as well as seizing numerous coins.

A day or two later the Pulátis viewed the seized items and positively identified certain medals, boxes, tokens and coin wallets as those which were missing from their home following the February burglary. [276] The Pulatis were unable to positively identify any coins. [312, 384-403] No item seized was ever identified as having been taken from the Money Vault. [Op. Cal. Sup. Ct., p. 5]*

Following this viewing Officers Gallmeister and Merino of the Santa Ana Police Department filed a second complaint (in the same general form as the first complaint) charging defendant in two counts with burglary of the Pulati residence and with concealing and withholding stolen property.

Defendant in the meantime had been released on bail shortly after his arrest on the first warrant. Gallmeister and Merino therefore, solely on the basis of the second complaint, obtained a second warrant of arrest. The defendant was again, on September 16, arrested at his home on the authority of this warrant. Gallmeister and Merino,

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* 68 Adv. Cal. at 452; —— Cal. Rptr. at ——.

who had observed and aided Del Coma make the first arrest and search, this time searched the residence themselves with Del Coma observing. [318-22]

The fruit of the search of September 13, People's Exhibits 11 and 12, was admitted into evidence, over standing objection on Fourth Amendment grounds, at defendant's subsequent trial. [272, 279, 399-400; Cl. Tr. 65-73] The evidence seized was admitted on the basis that it had been legally seized under the authority of a valid felony arrest warrant. [272]

Summary of Argument

The Fourth Amendment, construed in the light of judicial history, was intended to require use of a valid search warrant as a condition to searching a man's home.

The cases decided by this Court which appear to make an exception to the search warrant requirement can be harmonized to show that the exception to the search warrant requirement, in the case of a home, is limited to situations where the officer has antecedently justified his right to arrest and has had additional information which would have justified issuance of a search warrant and has conducted the search in good faith.

On the facts of this case there were no exigent circumstances and no antecedent justification of any sort. In addition, the officer did not have information which would have justified issuance of a search warrant and there is a strong inference that the search was not conducted in good faith.

For those reasons, the search and the judgment founded thereupon is inconsistent with the Fourth Amendment and should be disapproved.

ARGUMENT

SECTION I

The Fourth Amendment, Viewed in Historical Perspective, Was Intended to Require Use of a Valid Search Warrant for Search of a Home.

This case presents, on uncontradicted evidence, the fundamental question of when, if ever, an officer will be required to antecedently justify his actions in searching a home incident to an arrest. This question necessarily involves the secondary question of what scope of search is permissible with and without antecedent justification. Although there are two questions posed, each is so intimately related to the other as to make separate consideration of them the more difficult approach. Therefore, the right to search and the permissible scope will be discussed concurrently.

The Fourth Amendment is:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This Amendment, like the Constitution of which it is a part, states the principle in only the broadest terms, and leaves the mechanics of its application to the ingenuity of the Court and the legislature, thus leaving room for adapta-

tion to changing social conditions. For clarity, however, of the principle guaranteed by this Amendment, a brief glance at its ancestry and heritage may be helpful.

The recognized foundation of constitutional democracy is embodied in The Great Charter of King John, the *Magna Carta.* Several portions of that historic document are relevant to the case at bar:

> *Clause 38*: No Bailiff, for the future, shall put any man to his law, upon his own simple affirmation, without credible witnesses produced for that purpose.
>
> *Clause 39*: No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land.[2]

Coke, in his reknowned Institutes, asserts flatly that searches of a man's home, even for stolen goods, were not permitted by *Magna Carta*:

> And yet it is to be underftood, that if one be indicted of felony, the fherif may be proceffe thereupon after denyall made, &c. break the houfe for his apprehenfion, or upon hue and cry of one that is flain or wounded, fo as he is in danger of death, or robbed, the kings officer that purfueth may (if denyall be made) break a houfe to apprehend the delinquent: but for juftices of peace to make warrants upon furmifes, for breaking the houfes of any fubjects to fearch for felons, or

[2] The material quoted and the clause numbers are from Stringham, *Magna Carta, Fountainhead of Freedom,* App. B, Law. Coop. Pub., 1966. The clauses in the original document were not numbered.

> stoln goods, is against Magna Carta, . . . and againft the ftatute of 42 E. 3. cap. 3. &c.

Coke, 4 Inst. 176 (ca. 1629), quoted from Clark & Sons ed., London, 1817.

Unfortunately, the footnote to the quoted material refers to "Mag. Car. c. 29" as authority for the statement. Presumably though, despite the difference in numbering which might have come about in translation, Coke had reference to Clause 39 as set forth above. Nevertheless, it would seem that Clause 38, when read together with 39, would also support the statement. But even in Coke's time, this prohibition against searches of the home appears to have been honored in not small measure by its breach. Thus in 4 Inst. 177, he states:

> For though commonly the Houfes or cottages of poore and bafe people be by fuch warrants fearched, &c. yet if it be lawfull, the houfes of any fubject, be he never fo great, may be fearched, &c. by fuch warrants upon bare furmifes.

From this it seems probable that during the 400 years of existence of the Great Charter at the time Coke wrote, there had been a process of erosion of what he took to be an absolute prohibition against searching a man's home to obtain that which will convict him. The practicalities of keeping the law had worked a quiet, but small, intrusion on its letter. That process is further made clear in the celebrated case of *Entick* v. *Carrington,* 19 How. St. Tr. 1029 (1765). In *Entick* the Secretary of State had issued a warrant to search Entick's home for allegedly libellous papers. Learning of the ransack under warrant, Entick

sued the King's messengers, Carrington and others, in the Court of Common Pleas for trespass. His case rested on the claim that the Secretary of State had no jurisdiction to issue a warrant to search anyone's home for evidence. Judgment for the plaintiff was affirmed per Lord Camden, C. J. In the course of his opinion, Lord Camden refers to Coke's statement above:

> Sir Edward Coke denied the lawfulness of granting warrants to search for stolen goods; 4 Inst. 176, 177, though now it prevails to be law, but in that case the justice and the informer must proceed with great caution. There must be an oath that the party has had his goods stolen, and has strong reason to believe they are concealed in such a place, but if the goods are not found there, he is a trespasser, . . .

[1558-1774] All E. R. Rep. 45.

Notably, Lord Camden does not directly dispute Coke's earlier views but merely asserts that "it *now* prevails to be the law" etc., thus suggesting that the then unlawful practice which Coke had mentioned had become, in the intervening 140 years, a recognized exception. And so it often is with the law, an abuse corrected, as by *Magna Carta,* is corrected with an excess of zeal which impels the pendulum to swing too far the other way. It remains then for the courts to shape and fashion from their day-in, day-out experience the exceptions and limitations which will more nearly accommodate the principle with the conflicting interests remaining.

But even with the exception Lord Camden acknowledged, one thing is transparently clear from the English cases: Any legal right to search a man's home was very, very

grudgingly given, and when given it was attended by the strictest safeguards to preclude any arbitrary rummaging through a man's private possessions. And having just fought a revolution based in part on the pernicious writs of assistance, it must be assumed that the framers of our own Constitution were fully familiar with the English law and had no intention of extending it an inch. See *Boyd* v. *United States,* 116 U. S. 616 (1885).

SECTION II

The Search in This Case Is the Equivalent of or Exceeds What Might Have Been Done Under a General Warrant.

At this point a striking comparison emerges. At one end of the spectrum, lies the *Magna Carta,* under which there is every reason to think a free man's home was set aside in unimpaired privacy to him. This was his castle and it was legally inviolate. At the other end of the spectrum lies the case at bar. No fact was ever presented to a magistrate to evidence that a crime had been committed. [68 C. 2d ——,* 439 P. 2d 335]. No fact was ever presented to a magistrate to evidence that this defendant had committed a crime. No fact ever was, and no fact could have been, presented to a magistrate to evidence that certain goods were likely to be found in defendant's home. (R. T. 316, 323, 330) The case at bar, for those reasons, under the holding of the California Supreme Court, in fact authorizes more than a writ of assistance would have. Chief Judge Learned Hand wrote of this in *United States* v. *Kirschenblatt,* 16 F. 2d 202, 203 (CCA 2d, 1926):

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* 68 Adv. Cal. 452.

> After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home.

Kirschenblatt probably now lacks vitality as an authority, but it seems to be impossible to chart a logical course which permits an escape from Hand's quoted argument.[3]

SECTION III

The Statement "No Warrant Is Required" for Search of a Home Is Erroneous and Is Not Supported by Authority.

But it is claimed to be a different problem which is presented by this case. It is said to be merely a search undertaken incident to a valid probable cause arrest. For that reason, there is no need to consider search warrants for the right to search the place of arrest when making a valid felony arrest is a "practice of ancient origin" [*Harris* v. *United States*, 331 U. S. 145 (1946)] and "is not to be

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[3] As an aside, the California court has now decided that the offender need not even be home. Rather, it is sufficient that the officer "believe" he is at home, despite the fact of identification papers to the contrary. No reason whatsoever appears in the opinion for proceeding in the first place without a search warrant. *People* v. *Hill*, 69 C. 2d ——,* —— Cal. Rptr. —— (Nov. 13, 1968).

* 69 Adv. Cal. 568.

doubted." [*Agnello* v. *United States*, 269 U. S. 20, 30 (1925)][4]

What of this ancient right that is not to be doubted? Is it a legitimate part of our jurisprudence or is it a latter-day makeshift, spawned in error and nurtured in confusion? In *Entick*, Lord Camden states: "If this is law it would be found in our books, but no such law ever existed in this country." In *United States* v. *Rabinowitz*, 339 U. S. 56 (1949) the Court crystallized for the first time in a holding the proposition that in an otherwise reasonable search *"no warrant is required."* Is that statement supported by authorities preceding, and cited in, *Rabinowitz*? It seems appropriate at this point to pause for definition of terms.

Mr. Justice Holmes once aptly stated:

> As long as the matter to be considered is debated in artificial terms there is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied.

Guy v. *Donald*, 203 U. S. 399, 406 (1906).

Words, like photographs, serve their users only as they create an image in the mind of the reader. But unlike photographs, a given combination of words may produce as many different images as there are readers. For this reason it is imperative to communication of the discussion that follows that the elusive and skittish term "probable cause" be firmly bolted down on a common ground of meaning.

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[4] Despite its "ancient heritage," neither Coke nor Lord Camden seem to have heard of it.

"Probable cause" merely describes an evidenciary state. At its simplest it refers to a state of evidence upon which a reasonable belief in the truth of a given proposition may be founded. But it follows that the quantum and the type of evidence which will reasonably support belief will depend entirely upon the proposition which is questioned. Thus, discussion of "probable cause" standing alone lacks meaning. The term acquires meaning for practical application only if it is directed to a point of reference, "probable cause to believe A."

Generally, probable cause which will justify the arrest of a person consists of evidence from which a reasonable man would infer a) that the acts constituting each element of a given crime have been performed and b) that a given person committed those acts.

But it is well settled [*Camara* v. *Municipal Court*, 387 U. S. 523 (1967)] that probable cause which will justify issuance of a search warrant (in the case of a crime) requires an additional element: the evidence must indicate a) that a crime has been committed and b) that a given person committed it and c) that the described object of search is likely to be found in a given place. That this distinction has caused the state courts some difficulty is illustrated by the selected state cases set forth in Appendix A, *infra*, p. 33.

To avoid any confusion as to meaning, the term "probable cause" will not be used. Rather, the phrase "cause for arrest" will be used to refer to the evidenciary state required for issuance of an arrest warrant and "cause for search" will be used to refer to the evidenciary state required for issuance of a search warrant. For convenience, since it is not in issue, it will be assumed that evidence

sufficient to justify issuance of an arrest warrant would be sufficient to justify an arrest without warrant.

Returning then to *Rabinowitz*, *Weeks* v. *United States*, 232 U. S. 383 (1913) is cited for the proposition that the right to search the person incident to arrest has been recognized here and in England. This statement is undoubtedly correct and rests on the most compelling necessity: the officer's vital and immediate need to protect himself from the thrust of a hidden and unsuspected dagger. But this is no support for the proposition that no warrant is required for search of a man's home. So *Weeks* is not the book where the law is found.

The *Rabinowitz* Court then cites *Agnello* v. *United States*, *supra*, as authority for the statement here challenged. Although the statement certainly appears in the *Agnello* opinion (269 U. S. at 30), it was quite unnecessary to decision of the case and thus constitutes *obiter dictum*. That is to say, the *Agnello* opinion points out that the only search which was incident to an arrest took place at the Alba home and its legality was not challenged. As to the facts surrounding the search at the Alba home, the Court devotes four sentences:

> Upon the apparent consummation of the sale, the agents rushed in and arrested all the defendants. They found some of the packages on the table where the transaction took place, and found others in the pockets of Frank Agnello. All contained cocaine. On searching Alba, they found the money given him by Napolitano.

In addition to being dictum, it is clear that the facts stated do not support the conclusion reached. On the contrary, the facts portray a typical arrest of persons then com-

mitting a felony, a search of their persons and a seizure of contraband in open view. The facts do not even remotely suggest any search other than that of the persons arrested. *Agnello* then is not the book where the law is found.

Both *Rabinowitz* and *Agnello* cite *Carroll* v. *United States,* 267 U. S. 132 (1924) as authority for the "right to search the place of arrest." But *Carroll* seems to be authority, if anything, for the proposition that a search warrant is an absolute requirement for the search of a home. In fact the *Carroll* Court devotes the better part of five pages of the opinion to an analysis of the applicable national prohibition statute and the legislative history thereof. The Court concludes from this analysis that Congress had made an implied statutory grant of power to search vehicles of transportation without a warrant. But at the same time, the analysis discloses an express statutory prohibition against searching any private dwelling without a search warrant. To do so was made a crime. 267 U. S. 146-47. *Carroll,* therefore, is not the book where the law is found.

Finally, *Rabinowitz* relies on *Marron* v. *United States,* 275 U. S. 192 (1927) as authority for the no-warrant rule. This is difficult to follow, for the officers in *Marron* in fact had a valid warrant which authorized search of that very place. In the course of the search, they came on a ledger which later materially aided the prosecution of the case. This ledger was not described in the search warrant. The *Marron* Court justified seizure and use of the ledger by a mild sprinkling of legal fiction, holding that this was an instrumentality by which the crime was committed. Having gotten that far with tongue in cheek, the Court had no difficulty in concluding that seizure of the ledger was

justified as a seizure of an instrumentality of crime made in the course of effecting a valid arrest.[5] So in the final analysis of *Marron,* recognizing the fiction employed as a valid device to serve legitimate Fourth Amendment ends, the case is not a search case at all but is instead a seizure case. Certainly, therefore, a case of legal search under valid search warrant cannot conceivably support the statement that "no warrant is required." In consequence, we have no books in which this law is found, "so it is sure that no such law ever existed in this country."

For the foregoing reasons, it is respectfully urged that the statement in *United States* v. *Rabinowitz* that in an otherwise reasonable search, a "warrant is not required" is erroneous. It is a derelict on the waters of the law and deserves once and for all time to be put to its final rest.

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[5] The error in citing *Marron* as authority for a warrantless search probably arises from considering a search and seizure as one act or transaction. Obviously, when viewed as two distinct acts, they are utterly different concepts. A search, of necessity, must precede any seizure, except as to items in open view, as in *Agnello.* And the threshold question in a search case is—was it legal to make a search at all? In *Marron* the search was perfectly legal. It had been antecedently justified by the issuance of a valid search warrant. For that reason the officers not only had the right, they were under a duty, to be where they were, doing what they were doing—searching. And where violation of a citizen's privacy is validly done under judicial warrant, it does no violence to the Fourth Amendment to permit seizure of evidence of the very crime for which the search is authorized, and which comes to light in the course of an otherwise legal search. The ends of the Fourth Amendment are fully served by requiring antecedent description of what is thought to be there without straitjacketing the seizure provision. The description requirement precludes the making of a general search under a specific warrant.

SECTION IV

The Test for Constitutional Validity of a Warrantless Search Enunciated in Rabinowitz Provides No Guidance for the Lower Courts.

The progression through 750 years of constitutional history under *Magna Carta* and under our own Constitution has shown that some right of search is required in the interest of effective law enforcement. The problem, however, is determination of the parameters of reasonable and necessary search which will, at the same time, be faithful to the express terms of the Fourth Amendment. In making such a determination, it is apparent that the standards set must be such as to permit their effective application by the various lower courts, who will in fact be applying them in day-to-day cases. *Rabinowitz* has failed of its purpose in that regard at least. On its facts, the case was a very limited and narrow holding which would probably not be objectionable had the decisions of the lower courts under it been limited to essentially similar fact situations. Unfortunately, as the case at bar and the cases in Appendix A rather vividly illustrate, there has been a clear tendency for lower courts to reason: "If we find 'cause to arrest', *ipso facto* we have found 'cause to search'."

The problematical *Rabinowitz* standard is:

> The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion depends upon the facts and circumstances—the total atmosphere of the case.

As a practical matter, most cases begin and end in a court of original jurisdiction, a Justice Court, a Municipal Court,

a County Court or a District Court. And by like token, the determination of "reasonableness" usually begins and ends within the broad "legal discretion" of the particular judge sitting in the court of original jurisdiction, necessarily subject to the totality of his prior experience, his predilections and his unrealized but humanly inescapable biases and prejudices. And as those human realities exist so must they express themselves in terms of results under a rule which asks—in fact requires—that a judge decide a constitutional issue by first considering the "total atmosphere of the case" and then determining whether it was "reasonable" in that atmosphere to search without a warrant. In a given case, would the same result be likely to obtain from a judge who had been appointed to the bench from 20 years as a prosecutor as would from a judge who had been appointed from 20 years as a public defender?

This Court's recognition of the problems inherent in and its dissatisfaction with vague and general expressions of constitutional standards is perhaps best illustrated by comparison of relevant quotations from some recent and some not-so-recent landmark cases dealing with the right to counsel, due process, confrontation of witnesses and admissibility of illegally obtained evidence. These quotations are set forth in Appendix B, *infra*, p. 39.

SECTION V

This Court's Cases Can Be Harmonized to Show That No Search Will Be Approved for Which a Search Warrant Could Not Have Been Obtained.

As noted in the petition for certiorari, this Court has, in several very recent cases, rather strongly suggested that the "warrant is not required" language of *Rabinowitz*, if it is the law at all, is to be accorded an extremely limited scope. See *Schmerber* v. *California*, 384 U. S. 757 (1966); *Camara* v. *Municipal Court*, 387 U. S. 523 (1967) and *Katz* v. *United States*, 389 U. S. 347 (1967). As a corollary, the Court has indicated its intention to favor the use of search warrants by avoiding hypertechnical interpretation of the underlying affidavit:

> A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting . . . . [therefore] the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

United States v. *Ventresca*, 380 U. S. 102, 108-09 (1965).

However, the direct suggestion in *Ventresca* does not appear, in the light of this Court's earlier cases, to be an innovation which first saw light in that case. Rather, there is substantial evidence to support the notion that the language in that case merely expresses a premise which this Court has applied over many years but which has been limited in its direct expression to the factual result of the cases decided.

The method suggested by Professor Goodhart[6] will be utilized here to demonstrate the principle which seems to be reflected in the results of the cases.

The first group of cases, while representative, are not applicable to the facts of the case at bar, and so will be limited in number. In this first group are the "exigent circumstances" cases. They involve on their facts an arrest, a contemporaneous or subsequent search, or in one case even a prior search, and operative facts which show that obtaining a search warrant would have posed serious questions as to apprehension of the defendant, destruction of evidence, danger to persons, etc. In each case in this group there is a stated factual basis for immediacy. Cases in this class have almost uniformly met with this Court's approval of the search involved. See, for example, *Warden* v. *Hayden*, 387 U. S. 294 (1967); *Schmerber* v. *California, supra; Brinegar* v. *United States*, 338 U. S. 160 (1948) and *Carroll* v. *United States*, 267 U. S. 132 (1924).[7]

The second group of cases are those in which there was no stated evidence of exigent circumstances, but there was

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[6] Lecture given at the University of London in 1930, Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, published in Jurisprudence in Action, Baker, Voorhis, New York, 1953, p. 193 et seq. Goodhart looks, in search of the rationale, to the operative factual result of the decision viewed in light of the facts of the case which the court found to be material. The analysis made here will extend this theory to a line of cases on the assumption that if a series of similar operative results follow from facts common to all cases considered, the principle rests in the common facts.

[7] *Ker* v. *California*, 374 U. S. 23 (1963) might also be included in this group since there was reliance by the majority on the exigent circumstance exception. 374 U. S. 61 (dissenting opinion). It is preferred, however, to treat *Ker* in Appendix A, *infra*, p. 37, since the substantive authority of the case may be open to question.

at some point an arrest, a search which extended much beyond the person of the arrestee, all conducted without *any* warrant, and all disapproved on review. While several of these cases involve searches which were, on their facts, too remote in time or distance to be judged "incidental", all were suggested to be searches made as an "incident to a valid arrest."[8] These cases are: *Katz* v. *United States, supra; Stoner* v. *California,* 376 U. S. 483 (1964); *Jones* v. *United States,* 357 U. S. 493 (1958); *Miller* v. *United States,* 357 U. S. 301 (1958); *McDonald* v. *United States,* 335 U. S. 451 (1948); *Johnson* v. *United States,* 333 U. S. 10 (1947); *Trupiano* v. *United States,* 334 U. S. 699 (1947); *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344 (1930) and the dean of the search cases, *Weeks* v. *United States,* 232 U. S. 383 (1913).

Finally, the last group of cases involve an arrest, a related search and the discovery of damning evidence. But each case in this group has been founded on use, by the

[8] *Preston* v. *United States,* 376 U. S. 364 (1964), decided by a unanimous Court, is instructive as to what is not an "incidental" search. See also *Taylor* v. *United States,* 286 U. S. 1 (1931) and *Amos* v. *United States,* 255 U. S. 313 (1920) for similar holdings. Some question may be raised as to the utility, as a communication device, of the concept of a search being "too remote", or the affirmative, that a search may be permissible because it is contemporaneous with an arrest as to time and place. This terminology would appear to obscure with an easily applied, and equally easily mis-applied, label the two questions which are always raised in a search case: Can any search be made consistent with the Fourth Amendment, and if so, within what permissible scope? Since the purpose of the Fourth Amendment's prohibition against unreasonable searches must rest on concern for protection of the citizen's privacy from arbitrary governmental invasion, a completely intangible concept, serious doubt exists as to the practicability, if not the impossibility, of honoring such an intangible concept by means of a mechanical time and distance formula. Nevertheless, the rule, despite its shortcomings, does have the virtue of administrative simplicity in those cases to which it applies.

searching officer, of a *valid warrant,* either for arrest or search. Thus, these are the "antecedent justification" cases. The cases in this group, with one exception which will be discussed, have uniformly met with this Court's approval as to legality of the search. The cases are: *United States* v. *Ventresca,* 380 U. S. 102 (1965); *Rugendorf* v. *United States,* 376 U. S. 528 (1964); *Jones* v. *United States,* 362 U. S. 257 (1960); *Abel* v. *United States,* 362 U. S. 217 (1960); *United States* v. *Rabinowitz, supra; Harris* v. *United States,* 331 U. S. 145 (1946); *United States* v. *Lefkowitz,* 285 U. S. 452 (1931); and *Marron* v. *United States,* 275 U. S. 192 (1927).*

Lefkowitz, of course, is the maverick in the last group of cases for there was a valid arrest warrant but the search was nevertheless disapproved. However, a careful review of the facts of *Rabinowitz* and *Harris* suggests that there is a valid factual distinction which harmonizes *Lefkowitz* with this group.

Rabinowitz devotes most of two pages of the opinion to a detailed statement of the facts known to the officer at the time of search. 339 U. S. 57-58. The Court made a specific finding that the search was neither general nor exploratory. 339 U. S. 62. The facts known to the officer as stated by the Court doubtless would have been sufficient to have authorized issuance of a search warrant. Thus, on the facts the search could have been conducted under a valid warrant. Therefore, the departure permitted by *Rabinowitz,* without minimizing it, was a technical departure.

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* Neither *Stanford* v. *Texas,* 379 U. S. 476 (1965) nor *Aguilar* v. *Texas,* 378 U. S. 108 (1964) appear in the foregoing group for the reason that the warrants used in those cases were specifically held to be invalid. The justification for those searches, though antecedent, was legally insufficient.

The same is true of *Harris* on the material facts stated by the Court. There was a specific finding that the search was neither general nor exploratory. 331 U. S. 153. The search was directed to discovery of two cancelled $10,000.00 checks and was found by this Court to have been in good faith so conducted. Presumably, the finding of specificity was sufficient to infer that the information known to the arresting officers would have been sufficient to have authorized issuance of a search warrant for the checks. So, the departure permitted by *Harris* is similarly a technical departure.

In contrast with that situation, the *Lefkowitz* opinion specifically finds that the search was both general and exploratory. No warrant could have issued for a general and exploratory search.[10] Therefore, *Lefkowitz* does not appear, on its material facts, to be inconsistent with the other cited cases.[11]

From the foregoing groups of cases, several rules of general application which have in fact been applied over the years can be discerned:

1. *The Exigent Circumstance Rule*: An arrest upon "cause to arrest", without antecedent justification, will justify a search similar in scope to that which might be

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[10] *Lefkowitz* is also troubled with the "mere evidence" rule, and that may be the basis of decision. The teaching is the same: That which could not have been done under warrant will not be countenanced "incident to arrest."

[11] *Kremen* v. *United States*, 353 U. S. 346 (1957) has been omitted from this group because of the exceptional facts on which it rests. Under a valid warrant, the officers seized and removed to their office, 200 miles distant, the entire contents of a house. The inventory of goods seized occupies 11 pages of an appendix to the opinion.

made under a valid search warrant, if there are proven facts which support a finding of exigent circumstances.

2. *The Plain View Rule*: An arrest upon "cause to arrest", without antecedent justification, will justify only a search of the person of the arrestee and seizure of instrumentalities, contraband or evidence which is in plain view at the place of arrest.

3. *The Antecedent Justification Rule*: An arrest upon a valid arrest warrant, supported by antecedent justification, will justify a search similar in scope to that which might be made under a valid search warrant, if there are proven facts which support a finding that the officer had information which would have authorized issuance of a search warrant and that he acted in good faith in conduct of the search.

The foregoing rules, which appear to articulate what this Court has in fact done over the years, do not, with the possible exception of the third rule, do violence to the Fourth Amendment. The first merely states a proposition which is rooted in necessity and relies for its vitality in proof of a valid reason for immediacy. Since evidence and proof of a legitimate need for haste involves a relatively objective consideration, as opposed to proof of "reasonableness", this exception does not seem to have been particularly troublesome. The Congress has impliedly approved this rule. *Carroll* v. *United States, supra.*

The second rule illustrates an exception which has a very lengthy legal title and which is founded on the most compelling necessity as to search of the person.[12] As to

[12] For what it may reveal, a careful reading of the record in this case fails to reveal any evidence that the primary search, of the defendant's person, was ever made.

the second part of this rule, seizure of things in plain view, it is merely an expression of the "officer need not be blinded" language which is well supported in logic and in the cases. See *Marron, supra,* p. 18, fn. 5.

The third rule has led to some rather significant difficulties and is somewhat troublesome from a logical point of view. The exception is probably founded on the understandable reluctance of this Court, or any other court for that matter, to invalidate a search and liberate a proven criminal when indeed the factual situation has been shown to be consistent with the Fourth Amendment and there has been only a failure to comply with the strict letter of the law. Primarily this rule raises an evidenciary problem. The validity of the search will, in almost every case, turn on the probity of the testimony later given by the searching officer, limited only by the record which supports the arrest warrant. But no matter the probity of the officer one way or the other, and assuming the officer's later testimony is not in any way influenced by what the search reveals (an assumption contrary to human experience), this rule would seem to be undesirable for law enforcement. It assumes that the officer in fact has had time and has had opportunity and has in fact obtained a valid arrest warrant from a magistrate. For that reason, it is impossible to say that any burden whatsoever would have been imposed to have obtained the correct process, a search warrant. So, under those conditions, to proceed with merely an arrest warrant exposes the officer to possible invalidation of the search without even any additional convenience to him. The only benefit to the officer under this rule would arise when he did not have "cause to search" and, at least on the assumptions made, that search would ultimately fail anyhow. Perhaps, though, this rule was intended to be an extremely

narrow exception which would see very little application from day to day due to the difficulties noted. *Rabinowitz* supports this view. Unfortunately, as this case and those briefed in Appendix A, *infra*, p. 39, illustrate, the rule has received the broadest possible application by literally mangling into its protective confines cases which have not the vaguest factual resemblance to the basis for the rule.

Finally, these rules, if they are validly deduced, necessarily preclude by their reference to search warrants any search which is general or exploratory. In addition, they militate against the arrest which is "manuevered" so as to take place on premises which the officer may desire to search. "Manuevering" clearly is inconsistent with proceeding under a "good faith" exception. Having examined the law generally, the facts of the case at bar will now be examined with reference to this law.

SECTION VI

The Rules Enunciated by This Court, as Applied to the Facts of This Case, Require Reversal of the Lower Court's Judgment.

Officer Del Coma did, on September 13, 1965, have facts known to him which constituted "cause for arrest" of the defendant for burglary of the Money Vault. [R. T. 96-97, 247-48, 250-51, 260-61] There were no "exigent circumstances." [Resp. to Pet. for Cert., p. 11] The officer did not antecedently justify his right to arrest the defendant. [R. T. 558; p. 4, *supra*, fn. 1] The officer did not have information which would have constituted "cause for search." [R. T. 316, 323, 330] The officer, inferably, "manuevered" the arrest of defendant so as to make defendant's home the

place of arrest. [R. T. 271] Substantiation of "manuevering" is found in the officer's earlier warrantless arrest of defendant on the street [Op. Cal. Sup. Ct. p. 9*] and the fact of two identical searches of defendant's home conducted by the same officers within three days of one another. [R. T. 271, 318].

The fundamental point raised by these facts is that if the officer had applied for a search warrant prior to the search of September 13, one could not have been issued consistent with the Fourth Amendment. For that reason, affirmance of this case would irresistibly lead to the conclusion that an officer's right to search a man's home is greater without a search warrant and without antecedent justification than it is with those protections. Resolutely, the foregoing conclusion, once reached, compels the further conclusion that search warrants should not in any case be used. This conclusion is equivalent to repeal of the Fourth Amendment. No Court can do that. Therefore, this case must be reversed.

If the inference of "manuevering" the place of arrest is validly reached, this, in effect, is using the arrest as a pretext to search. For that reason alone the case should be reversed.

As a third ground, the failure of the officer to antecedently justify either the arrest or search is reason, standing alone, for reversal under this Court's cases. But since it will probably be argued by the respondent that the officer in good faith believed, under procedure which had obtained for at least 74 years in California, that no antecedent justification was necessary, that point deserves ex-

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* 68 Adv. Cal. at 454.

amination. If the question before the Court was goodness or badness of the officer, this contention would be meaningful. But that is not the question before the Court. The clear purpose of the Fourth Amendment is to protect with a constitutional mantle the right of the people to privacy of their "persons, houses, papers and effects." It matters not that an officer in good faith may have thought this inapplicable, the right of privacy is as surely violated. "[No] Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . " The Constitution was not obeyed.

But even the claim of good faith on the officer's part rings a warning bell of grave doubt. He knew that no factual statement would be required for an arrest warrant. He had no reluctance in the same case, on the same facts, to make an arrest without warrant. His statement that defendant's home was chosen as the place of arrest so as "not to cause him any problem" at work is a pill that is hard to swallow as sworn truth. [R. T. 271] Out of concern for the defendant's well-being, it is concluded that it is more desirable to be carted off to jail before the eyes of a wife and young child after ransacking their house than from the presence of co-workers. Why was the officer so mule-like in his reluctance to admit to any connection with the second search even though he was right there while it was in progress? [R. T. 321-22]

Finally, a word should be said as to prejudice. The respondent has indicated its intention to argue that the error in this case, if any, was non-prejudicial beyond a reasonable doubt. The evidence which was seized in the search of September 13 filled two airline-type handbags. It comprised hundreds of coins and medals, as well as numerous

other items. Some of these medals were positively identified by Mrs. Pulati. The only other tangible evidence introduced against defendant was a trade dollar which was not positively identified. [R. T. 436] Mr. Shapiro, the prosecution's witness, testified that there was a "reasonable possibility" that it was not the same trade dollar. Beyond that "reasonable possibility" the evidence upon which defendant was convicted was wholly circumstantial. It seems almost facetious on those facts to suggest that a finding of "non-prejudicial beyond a reasonable doubt" could be considered. *Chapman* v. *California*, 386 U. S. 18 (1967).

Conclusion

Based on the foregoing arguments and authorities, petitioner respectfully requests that the judgment of the Supreme Court of the State of California be reversed and the case remanded for a new trial.

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